plaint upon the said Kamaruddin bin Haji Ibrahim, who is neither a partner nor the person having control and management of the 1st Defendant and upon the further ground that no such partnership firm exists or ever existed."

On the 10th August 1938, a summons (Enclosure 12) was taken out on behalf of Kamaruddin applying that the service of the plaint and summons on him be set aside on the grounds stated in the notice of conditional appearance.

This summons came on for hearing before me in Court on the 9th June 1939. The suit had been listed for trial, why, I do not know, as the application on this summons should have been heard in Chambers.

At the hearing, a preliminary objection was taken by counsel for the Plaintiff—to the effect that under the existing rules and procedure of the Court there was no provision for and no such thing as entering a conditional appearance. Where however suits were instituted by or against firms and persons carrying on business in names other than their own, the practice and procedure in regard to service was that laid down in Cap. XXXIII, sections 402—413 of the Civil Procedure Code.

It was submitted therefore that, where a person who was served as a partner denied the partnership or that he was a partner, the proper procedure to be adopted was that laid down in sections 408 and 409 and that these sections would be applicable to the circumstances where, under the English Rules, a conditional appearance would have been entered.

Section 408 provides that in the case of service on a person having the control or management of the partnership business, there is no necessity for him to enter an appearance unless he is a partner of the firm sued.

Section 409 provides that any person denying that he is a partner may file a written statement to that effect but the suit continues against the firm provided the requirements of section 404 are complied with. Section 404 provides that where persons are sued as partners in the name of the firm, there must be service on one or more of the partners or service at the principal place of business upon any person having at the time of the service the control or management of the partnership business. The difficulty is that it is alleged that Kamaruddin, who was served, was neither a partner nor the person having such control or management and that no such partnership firm exists or ever existed.

It seems to me therefore that the position so far as Kamaruddin is concerned, is covered by section 409. All he has to do is to file a statement as therein contained and the suit cannot continue until a partner or alternatively the manager has been served in accordance with section 404.

What happens subsequently if the statement is controverted is not before me at the moment and all I am concerned with is the question of whether the proper procedure has or has not been adopted by Kamaruddin in entering a conditional appearance, for which there is no provision in our rules. My answer to that is that it is not in order and that the procedure outlined in section 409 is the correct procedure which should have been adopted by him.

It follows therefore that the Summons in Chambers before me and taken out by him is also out of order and must be dismissed, with costs against Kamaruddin, in any event.

Application dismissed.

[ORIGINAL CIVIL JURISDICTION]
POYSER, C.J.
September 11, 1939.

COLDHAM
v.
THE RAUB AUSTRALIAN GOLD MINING CO., LTD.

[SELANGOR CIVIL SUIT No. 12 of 1938]

Civil Procedure Code (Cap. 7), S. 369,—security for costs—discretionary power of Judges to order.

A plaintiff ordinarily resident outside the jurisdiction of the Court, will generally be ordered to give security for costs. If, however, he resides in a country where provision exists for the reciprocal enforcement of judgments with the country in which the suit is instituted, then security for costs will not be required to be furnished.

Cases referred to:—

(1) *Crozat v. Brogden* (1894) 2 Q.B. 30.

(2) *Ellis v. Stewart* (1887) 35 Ch. D. 459.

(3) *In re Howe Machine & Co.* 41 C.D. 118.

(4) *In re Indian, Kingston & Sandhurst Mining Co.* (1882) 22 Ch. D. 83.

(5) *Lydney & Wigpool Iron Ore Co. v. Bird* (1883) 23 Ch. D. 358.

(6) *Martano v. Mann* (1880) 14 Ch. D. 419.

(7) *In re Percy & Kelly Nickel Cobalt & Chrome Iron Mining Co.* (1876) 2 Ch. D. 531.

(8) *In re Pretoria Pietersburg Railway Co.,* (No. 2) (1904) 2 Ch. 359.

(9) *Raeburn v. Andrews,* L.R. 9 Q.B. 118.

(10) *Raman Chettiar v. Palaniappa Chettiar,* 8 M.L.J. 165.

V. Mackie, for Defendant:

The general rule is that security for costs will be ordered if the Plaintiff resides out of the jurisdiction. Civil Procedure Code Sec. 369. *Daniell's* Chancery Practice p. 68. Order 65 rule 6. Annual Practice p. 1438. *In re Pretoria Pietersburg Railway Co.* (No. 2)[8]. *Crozat vs. Brogden*[1]. *In re Percy & Kelly Nickel Cobalt & Chrome Iron Mining Co.*[7].

Security may be ordered at the institution or at any subsequent stage of a suit. Civil Procedure Code sec. 369. Annual Practice p. 1444.

A Plaintiff cannot be compelled to give security for costs unless he himself states on writ or pleading or unless the fact is established by Affidavit that he has gone out of the jurisdiction for the purpose of residing there. *Daniell's* Chancery Practice 8th Ed. p. 70. Plaintiff's Affidavit of 25th January 1939 was affirmed in Singapore but gave no address. His Affidavit of 19th June 1939 gave a Singapore address. Security was asked for on 22nd July 1939. Application was filed on 30th August 1939. No undue delay in view of fact that Defendant Company's Directors were in Brisbane. *Ellis vs. Stewart*[2]. *Martano vs. Mann*[6]. *Lydney & Wigpool Iron Ore Co. vs. Bird,*[5]. *In re Indian, Kingston & Sandhurst Mining Co.,*[4].

The Judgments (Reciprocity) Enactment Cap. 3 is not parallel with the Judgments Extension Act 1868. The latter applies only to England, Scotland and Ireland. The latter extends to far more distant countries.

F. G. Charlesworth, for Plaintiff:

1. Since the passing of the Judgments Extension Acts 1868 (31 & 32 Vict. C. 54) security for costs has not been required of a plaintiff residing in Scotland and suing in the High Court in England: *Raeburn v. Andrews*[9] and *In re Howe Machine Company*[3]. The Straits Settlements Reciprocal Enforcement of Judgments Ordinance (Cap. 46) and the Straits Settlements Gazette Notification 1190 of 1924 provide machinery for the enforcement of judgments of the Courts of the Federated Malay States against plaintiffs residing in the Straits Settlements similar to the machinery provided by the Judgments Extension Acts for the enforcement of English judgments against plaintiffs residing in Scotland. Security for costs should not be required from a plaintiff residing in the Straits Settlements and suing in the Supreme Court of the Federated Malay States.

2. The Court's power to order security under Section 369 (i) of the Civil Procedure Code is discretionary. This discretion has recently been widely exercised. *Raman Chettiar v. Palaniappa Chettiar,*[10]. In the present case where the circumstances are that the application is made only one month before the date fixed for the trial, the plaintiff has to the knowledge of the defendant been residing in Singapore for the last nine months and the case is ready for trial, the Court should exercise its discretion in favour of the plaintiff and refuse to order security.

Poyser, C.J.—This was an application by the defendant for an order that the plaintiff should give security for costs. At the conclusion of the arguments I refused the application, but stated that I would put my reasons for so doing in writing.

The plaintiff claims a substantial sum as damages for the alleged breach of an agreement entered into between him and the defendant Company. At the date of the institution of the action viz: the 19th of November 1938, the plaintiff was resident in the Federated Malay States, but in January 1939 he moved to Singapore where he is now employed by Messrs. Gammons (Malaya) Ltd. at a salary of £1,900 per annum.

Mr. Mackie, for the defendant Company, argued that under the provisions of section 369 (i) of the Civil Procedure Code, he was entitled to the order he asked for, and that it was, in practice, a general rule that a person in the position of this plaintiff, who resided out of the jurisdiction and had no immoveable property within the jurisdiction, should give security for costs. Section 369 (i) is as follows:—

> "Where, at the institution or at any subsequent stage of a suit, it appears to the Court that a sole plaintiff is, or (where there are more plaintiffs than one) that all the plaintiffs are residing out of the Federated Malay States and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within the Federated Malay States other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs to give security, within a time to be fixed by the order, for the payment of all costs incurred and likely to be incurred by any defendant."

In support of this argument no Malayan reported case was cited, but Mr. Charlesworth agreed that such order had been made in several unreported cases, but

it did not appear that in any of such cases the point in question had been so fully argued as it was in this application.

Under English law, it would appear that although the Court has a discretion, the general rule is to order security for costs where a plaintiff is resident abroad. In *Daniell's* Chancery Practice, 8th edition, page 68, the following passage occurs:—

> "In order, however, to prevent the defendant or respondent from being defeated of his right to costs, it is a rule, that if the plaintiff or petitioner is resident abroad, the Court will, on the application of the defendant, or respondent, order him to give security for the costs of the action or petition, and in the meantime direct all proceedings to be stayed."

The Annual Practice (1939) at page 1438 states, in relation to Order 65 rule 6, that:—

> "The ordinary ground on which security is ordered is residence abroad; and subject to certain exceptions the rule is inflexible Where the plaintiff resides in Scotland or Northern Ireland, security for costs will not be required from him, for by the combined effect of the Judgments Extension Act 1868, and Judicature Act 1873 section 76, a judgment in any Division of the High Court was enforceable in Scotland or Ireland, but now by the operation of the Government of Ireland Act 1920 Southern Ireland is within the rule which requires security."

The following cases are in accordance with the above passages. In *In Re Pretoria Pietersburg Railway Co.*,[8] there is the following *dictum* of Buckley J:—

> "It is well settled, as a general rule, that if a person resident abroad is an actor or plaintiff in proceedings in an English Court....and has not assets within the jurisdiction which can be reached, he may, except in special circumstances, be ordered to give security for costs."

In *Crozat v. Brogden,*[1] Lord Esher M.R. said:—

> "I cannot quite make up my mind that, under all or any circumstances, the Court is bound to make a foreigner give security for costs if he brings an action in this country. The rule can hardly go that length; but if the matter is discretionary, the discretion, unless there is something very exceptional, is exercised only in one way."

Assuming that I were to follow this general rule, the question also arises as to whether the defendants' application was too late. It appears, however, that under the present English practice the Judge has a judicial discretion to direct at any time security for costs to be given (see *Daniell's* Chancery Practice, page 71). Such an application may be made after reply and notice of trial (see *Lydney & Wigpool Iron Ore Company v. Bird,*[5]). (His Lordship proceeded to consider the lapse of time which had occurred after the plaintiff's departure from the Federated Malay States had become known to the defendant company and continued:—)

It was further stated in support of the application that, assuming I had a discretion in the matter, the plaintiff would not be prejudiced if the order was made, for his Solicitor had stated that security would be given if ordered by the Court, and that it was essentially a case where security should be given, as the costs of the action would be very heavy, and the plaintiff was largely responsible for the considerable costs already incurred.

Mr. Charlesworth opposed the application on two grounds:—

1. That in law the order applied for could not be made;
2. That the Court had a discretion and should not exercise it in the defendant Company's favour, taking all the circumstances into account viz: the delay in making the application, the fact that they must have known that the plaintiff went to reside in Singapore in January 1939, and that costs so far incurred were in consequence of orders of Court.

On the first ground the case of *Raeburn v. Andrews,*[9] was relied on. It was there held that since the passing of the Judgments Extension Acts 1868 (31 & 32 Vict.) a plaintiff residing in Scotland was not required to give security for costs, and Quain J. in the course of his judgment stated:—

> "The reason that a plaintiff resident abroad was compelled to give security for costs was because he was not in reach of our law to have process served on him, in the event of the defendant obtaining a judgment. That reason having now ceased, the old rule is abolished."

The Judgments Extension Acts provided that judgments obtained in certain Courts of England, Ireland or Scotland could be reciprocally registered and enforced. Mr. Charlesworth argued that the Colony Reciprocal Enforcement of Judgments Ordinance (Cap. 46) follows Cap. 31 & 32 Vict., and has a similar effect, and I should therefore follow *Raeburn v. Andrews*[9].

On the second ground, Order XXV of the Indian Civil Procedure Code was cited. This order is similar to section 369 of our Code, and under that Order the Indian Courts have held, according to *Sarkar's* Civil Procedure Code, 8th edition, page 1937, that:—

> "The power given to the Court under this rule, to order security for costs, is discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case, and unless it is shown that the exercise of the power is necessary for the protection of the defendant, the Court ought not to interfere."

The only local case cited was *Raman Chettiar v. Palaniappa Chettiar and Another,*[10] in which Aitken J. followed the Indian practice, and held:—

"The power given to a Judge by section 369 (i) of the Civil Procedure Code is discretionary and one which the Court ought or ought not to exercise according to the circumstances of each case."

I have no hesitation in following Aitken J. and coming to the conclusion that the Court has a discretion whether to make the order asked for or not, and I can see no reason for holding that it is an inflexible rule that a plaintiff residing out of the jurisdiction must give security for costs. I would not hold as a matter of law that security for costs cannot be ordered against a plaintiff resident in any British territory where provision exists for the reciprocal enforcement of judgments with the Federated Malay States; but there is all the difference between enforcing an F.M.S. judgment in the Colony and enforcing one in, say, Uganda. We have very close legal relations with the Colony, an F.M.S. judgment could be quickly enforced there, and in regard to plaintiffs resident there, I would follow the decision in *Raeburn v. Andrews*[9].

Apart from any question of the Reciprocal Enforcement of Judgments Ordinance (Cap. 46), having a discretion as I hold I have, I would not make the order asked for. The application should have been made at a much earlier date and not after the date of trial had been fixed and considerable costs already incurred. It is true that in England such an application could now be entertained, but it does not follow that it would necessarily be granted. (His Lordship then examined the evidence and concluded that the fact that the plaintiff had moved to Singapore was probably known to the defendant company in January, 1939).

For the above reasons I dismissed the defendant Company's application with costs to be paid to the plaintiff in any event.

Application dismissed.

[APPELLATE CRIMINAL JURISDICTION]
GORDON-SMITH, J.
September 23, 1939.

PUBLIC PROSECUTOR v. YAP KIM BOK.

[PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 2 of 1939]

PUBLIC PROSECUTOR v. TEH POH.

[PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 3 of 1939]

Sentence—inadequacy—overloading.

In the case of deliberate, continued and contemptuous infringements of regulations which are necessary for the convenience and welfare of the public, such as regulations against overloading, small fines are grossly inadequate punishment.

MAGISTRATE'S CRIMINAL APPEALS.

The respondents in these appeals were charged with overloading their lorries, an offence under Section 68 (3) and punishable under Section 118 (1) of the Road Traffic Enactment, 1937, and were convicted by the Magistrate, Raub, and fined $25 and $10 respectively.

The Public Prosecutor appealed on the ground that the sentences were grossly inadequate in view of the fact that they were previously convicted for similar offence.

At the hearing of the appeals of the Appellate Judge enhanced the sentences.

A. J. Grattan-Bellew, Deputy Legal Adviser, for Public Prosecutor.

Respondents in person.

Gordon-Smith, J.—I heard these cases separately but gave one Judgment in respect of both increases of the respective fines imposed by the Magistrate.

In No. 2 case, I increased the fine to $250.00.

In this case the accused had already been convicted twice during the current year, the later conviction being only a few weeks prior to this third offence.

His lorry was over-loaded by more than two tons and therefore there was no question of the over-loading being accidental or by mistake.

In my opinion, it was a deliberate, continued and contemptuous infringement of regulations which are necessary for the convenience and welfare of the public. The restriction on loads to be carried over these minor roads is necessary to preserve such roads and bridges from serious damage and one can well imagine that wooden bridges are not necessarily constructed to carry loads of 7—8 tons on a lorry, probably going at a considerable pace. Damage to such bridges might put a road out of action for months, to the inconvenience of the public. Moreover, there is a considerable danger that a serious accident might be caused. This is apart altogether to the damage that might be caused to the surface of the roads by continuous use by heavy vehicles over roads which are not constructed for and not suitable for use by such heavily loaded lorries.

In No. 3 case, I increased the fine to $100.00 only as there had been only one previous conviction this year but this also had been within a few weeks of this last conviction. Also, the over load was not to the same extent as in the other case.